APPENDIX A — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED JULY 8, 1997

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, AND
RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS GLOBE NEWSPAPER COMPANY AND RICHARD A. KNOX'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT VII OF THE COMPLAINT

This motion for partial summary judgment, part of a case involving, *inter alia*, allegations of libel and invasion of privacy arising from intense publicity over medical errors that led to the death of a patient at a prestigious Boston hospital, raises difficult issues of media law: when is an event "newsworthy," and when can this issue be decided by the court as a matter of law?

For the reasons that follow, the court concludes that the events reported in the media accounts at issue were indeed newsworthy as a matter of law. Accordingly, the court allows the motion of defendants *The Boston Globe* ("the Globe") and Richard A. Knox ("Knox") for summary judgment on the claim of plaintiff Doctor Lois Ayash ("Ayash") for invasion of privacy (Count VII of the Complaint).

Appendix A

BACKGROUND

On December 3, 1994, Betsy Lehman ("Lehman"), a columnist for the Globe, died at the Dana Farber Cancer Institute ("Dana Farber"). Lehman was a patient in an experimental breast cancer treatment protocol ("the protocol") for women whose cancers had not been responsive to more traditional forms of treatment. The protocol was designed to test on women the efficacy and safety of high doses of cyclophosphamide, a drug used in chemotherapy. The plaintiff in this action, a physician at Dana Farber, was Protocol Chair, which gave her responsibilities relating primarily to the research aspects, as opposed to the clinical management, of the protocol.

In February 1995, a data clerk at Dana Farber discovered that Lehman and another patient in the protocol had accidentally been given overdoses of cyclophosphamide in November 1994. Due to a physician's error in interpreting protocol doses, the two patients were given four times the prescribed dose. Dana Farber officials, following this discovery, suspended the clinical privileges of two physicians who had been directly involved with the treatment of the two patients when the overdoses occurred. Both physicians were also placed on administrative duty. No action was taken then against Ayash, who did not have any direct clinical responsibilities for the patients at the time of the overdoses.[1]

On March 23, 1995, defendant Knox, a reporter for the Globe, published an article in that newspaper pertaining to the overdoses given to Lehman and the other patient. The article identified Ayash as both "the leader of the team" and

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[1] Ayash did rotate into the clinical role of attending physician for Lehman and the other patient on December 1, 1994. Although Lehman had suffered an adverse reaction to the cyclophosphamide treatment, Ayash did not discover that the overdoses had occurred.

a co-signatory of the order which led to the overdoses, and implied Ayash had been placed on administrative duty. As stated above, Ayash was not the clinical "leader" of the program; nor did she co-sign the overdose order. Another Knox article appeared on March 26, 1995. Additionally, Globe editorials were published which excoriated Dana Farber and its physicians for the overdoses.

On March 31, 1995, Dr. Ayash's clinical privileges were suspended and she was assigned to administrative duty. Additionally, two internal Dana Farber investigations of her conduct began. On May 2, 1995, Knox published an article in the Globe stating that Ayash and another physician had been "singled out in an internal disciplinary process launched last month by Dana Farber." On June 4, 1995, the Globe published a "correction", stating that Ayash had been erroneously identified in the original Knox article as having countersigned the overdose order.

Another Knox article appeared on October 31, 1995, which discussed internal Dana Farber documents relating to the investigations of the overdoses. Although Dana Farber had publicly released some materials relating to the investigations, Knox's article also stated that a non-public summary of an internal investigation had been "obtained by the Globe." The article also stated that Ayash was under investigation by the Massachusetts Board of Registration in Medicine.

In August 1995, Ayash received an oral reprimand by the president of Dana Farber for her alleged failure to detect the overdoses earlier than the point at which they were discovered.

DISCUSSION

Summary judgment must be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Na-*

tional Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the moving party is entitled to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). With respect to any claim on which the party moving for summary judgment does not have the burden of proof at trial, it may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); accord, *Kourouvacilis v. General Motors Corp.* 410 Mass. 706, 716 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." *Pederson v. Time, Inc.*, 404 Mass. at 17. The opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989).I.

The Globe has moved for summary judgment on Ayash's invasion of privacy claim brought under G.L. c. 214, § 1B (Count VII). The tort of invasion of privacy is of relatively recent vintage, and has been called "one of the most noteworthy legal inventions of the 20th Century." *The Florida Star v. B.J.F.*, 491 U.S. 524, 550 (1989) (White, J. dissenting). The development of a legal action for public exposure of private, personal facts is traced to an article by Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890). Another landmark in the development of this tort came with the publication of Dean Prosser's "Privacy," 4 Cal. L. Rev. 383 (1960), which dis-

cussed what are now recognized as the four types of invasion of privacy. See also Restatement of Torts, 2d, § 652A.[2]

Massachusetts has codified the right to privacy in G.L. c. 214, § 1B, which creates a right "against unreasonable, substantial or serious interference" with a person's privacy. Although the Supreme Judicial Court has never decided whether or not to recognize a common law invasion of privacy right, see *Alberts v. Devine*, 395 Mass. 59, *cert. denied*, 474 U.S. 1013 (1985), c. 214, § 1B is considered roughly analogous to the common law category which proscribes public disclosure of private facts. Restatement of Torts, 2d, § 652A(2)(c); *Bratt v. International Business Machines Corp.*, 392 Mass. 508, 519, n.15 (1984).

A.

In her brief, Ayash asserts that her claim belongs to the public disclosure species of invasion of privacy, which makes actionable disclosures of private, intimate facts about an individual that are not in any sense the business of the public or newsworthy. *Doe v. Town of Plymouth*, 825 F.Supp. 1102, 1109 (D.Mass. 1993) (disclosure of HIV status actionable). A disclosure is an invasion of privacy where private facts are revealed that would be offensive to a reasonable person and where the public has no legitimate interest in the facts being disclosed. *Id*; Restatement of Torts, 2d, § 652D. "When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." Restatement of Torts, 2d, § 652D, comment d. Thus, in cases involv-

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[2] The four categories of invasion of privacy recognized by the restatement are:

(a) Unreasonable intrusion upon the seclusion of another;
(b) Appropriation of the other's name or likeness;
(c) Unreasonable publicity given to the other's private life;
(d) Publicity that unreasonably places the other in a false light before the public.

Restatement of Torts, 2d, § 652A(2).

ing the media, "newsworthiness" is a complete defense to an invasion of privacy action, even if the plaintiff establishes that private, offensive facts about her have been disclosed. *See, e.g, Gilbert v. Medical Economics Co.*, 665 F.2d 305, 309 (10th Cir. 1981); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 74 (1979), *cert. denied*, 444 U.S. 1060 (1980).

The Massachusetts appellate courts have had limited opportunities to address invasion of privacy claims brought against the media. In *Cefalu*, 8 Mass. App. Ct. 71, the Appeals Court held that a news photograph of a man in an unemployment line was as matter of law of public interest, and that summary judgment was proper on the man's invasion of privacy claim against the Globe. However, *Cefalu* is distinguishable from the present case in important respects; there, the plaintiff was photographed in a public place, lending strength to the argument that the matter was of public interest. Here, by contrast, some of the information published about Ayash was both generated in private and was legally privileged.

Cefalu does not outline a test for assessing newsworthiness. Nor is the court prepared to find on the authority of *Cefalu* that newsworthiness is invariably a question of law, even though summary judgment was granted in that case. Faced with an absence of state authority on this important question of media law, the court will examine the decisions of other jurisdictions and attempt to formulate a reasoned test for assessing newsworthiness.

B.

In addressing the preliminary matter of whether newsworthiness is a question of fact or of law, the court notes that summary judgment is favored in cases involving the right of media to publish information, "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights." *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1046 (1984). This may be especially true in a "public disclosure" privacy action,

which is notably different from a defamation action, the other main legal recovery route for disclosures in newspapers, in that it permits recovery for truthful disclosures. *Romaine v. Kallinger*, 537 A.2d 284, 292 (N.J. 1988). A review of cases from other jurisdictions shows that the issue of newsworthiness has been treated of one of either fact or law depending on the circumstances presented. *See, e.g, Virgil v. Time*, 527 F.2d 1122, 1130 (9th Cir. 1985); *Gilbert*, 665 F.2d at 309. Thus, whether newsworthiness is a question for the judge or the jury depends upon the weight of the summary judgment record. Where material facts are in dispute, or where the facts present a particularly close question as to newsworthiness, summary judgment is inappropriate. As in other cases, the initial determination of whether or not a factual question exists is for the court. *Virgil*, 527 F.2d at 1130.

Turning to the issue of a legal test for assessing the newsworthiness of disclosed private facts, it is clear that establishing viable doctrine in this *area has not been an easy task. See "Trafficking in Stolen information,"* 105 Yale Law Jrn. 727, 732 (1995) (criticizing courts' tests for determining newsworthiness as inconsistent and incoherent).

One of the ironies of this case and others like it is that the newsworthiness of private facts is invariably assessed by courts after those facts have been trumpeted by the news media. Indeed, it is almost a truism that the newsworthiness of a person or event can be fostered, if not created, by news reporting rather than as a result of any intrinsic public interest in the person or event:

> Pushed to the extreme, the newsworthiness defense engulfs the tort of public disclosure, because, to a large extent, the media themselves determine what is newsworthy.

"Tort of Public Disclosure," 1990 Wisc. Law. Rev. 1107, 1121.

However, the court also notes that the media's privilege to publish newsworthy matters is not only an immunity accorded by the common law, but also one of constitutional di-

mension based upon the First Amendment of the United States Constitution. *Sipple*, 154 Cal. App. 3d at 1046; Restatement of Torts, 2d, § 652E, comment d. Thus, courts have generally concluded that publishers, not judges or juries, are the appropriate judges of what is newsworthy. *Heath v. Playboy Enterprises*, 732 F. Supp. 1145, 1149 (S.D. Fla 1990). "Only in cases of flagrant breach of privacy . . . or obvious exploitation of public curiosity . . . should a court substitute its judgment for that of the publisher." *Doe v. Sarasota-Bradenton Florida Television Co.*, 436 So. 2d 328, 331 (Fla. App. 1983).

In assessing newsworthiness, courts examine the subject the news report at issue and the logical nexus between this subject and any private facts revealed about the plaintiff. *See, e.g. Virgil*, 527 F.2d at 1130-1131 (general subject of body surfing in article was newsworthy, but factual question existed as to whether "bizarre" and unrelated facts disclosed about plaintiff were newsworthy); *Gilbert*, 665 F.2d. at 309 (policing medical profession newsworthy).

After a review of cases from other jurisdictions, the court adopts the following test: disclosures of truthful, private facts are newsworthy, as matter of law, where (a) the general matter at issue is one that is typically of public concern, and (b) the private facts disclosed are closely related to that matter of public concern.

C.

Turning to the present case, the defense of newsworthiness arises only if Ayash can meet her prima facie case by showing that private facts were disclosed about her that would be offensive to a reasonable person. The court finds an issue of material fact on these matters. At least some of the information disclosed about Ayash came from internal Dana Farber documents that are by law confidential. Certainly, facts in such documents could be found to be "private." *See Virgil*, 527 F.2d at 1130-1131.

Appendix A

The court also finds a factual question regarding whether a reasonable person would have been offended by the disclosures that occurred. Certainly, a jury could find that Ayash was reasonably distressed and offended by at least some of the information published about her. Damaging, employment-related information about Ayash -- again, some of it from legally privileged documents -- was placed directly in the public eye. *See, e.g, Cape Publications, Inc. v. Bridges*, 423 So.2d 426, 427-428 (release of nude picture could have been distressing to crime victim). Under the circumstances, Ayash reasonably could have been offended by the disclosures.

Since issues of material fact exist as to whether Ayash can establish a *prima facie* case of "public disclosure" invasion of privacy, the court must now address whether the newsworthiness defense nevertheless allows disposition her privacy claim as a matter of law. First, the court must assess whether the general subject at issue in the reports about Ayash is one that is typically of public concern. This determination is complicated in the present case by the fact that Lehman was herself a reporter for the Globe. Ayash asserts -- with good reason -- that Lehman's association with the Globe prompted unusually intense media interest in the case. Certainly the editorials and columns about the Lehman case were highly personalized, and reflected the anguish of other Globe staffers over Lehman's death.[4] Even Knox's news accounts, and the headlines placed over them,

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[4] Globe columnist Bella English wrote of the incident:

> Betsy should be alive today... Young women ordinarily do not die of cardiac arrest... The sheer incompetence takes your breath away. Let's start with the incompetence, which is nothing less than criminally negligent homicide. The staffers with their fingerprints on this death ... killed Betsy just as surely as if some driver had rune a stop sign and hit her.

at times lacked the dispassion that is supposed to be the hallmark of quality journalism.[1]

However, there is no evidence that absent Lehman's involvement in the story, the Globe would not have zealously pursued it. Regardless of who may have died at Dana Farber as a result of this incident, the events have been of public interest. Deficiencies in health care are generally a matter of public concern. *Gilbert*, 665 F.2d. at 309 (policing medical professional newsworthy). *See also ELM Medical Laboratory, Inc. v. RKO General, Inc.*, 403 Mass 779, 782-783 (1989). The stories which mentioned Ayash focused on two major, life threatening errors at a renowned cancer research center. The court concludes, as a matter of law, that the general subject of the reports that mentioned Ayash was of public concern.

Turning to the second prong of the newsworthiness test, the court also determines, as a matter of law, that the specific facts disclosed about Ayash were closely related to the matter of public concern discussed in the articles. Certainly, a relevant factor in considering this prong is whether the individual involved is one who typically receives public attention. Ayash, at least prior to the disclosures about her, was in no sense a public figure. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1973). However, having been "drawn into a particular public controversy," *id.* at 351, she arguably became a public figure for a limited range of issues. The reportage on her did not go beyond the scope of those issues. No lurid or extraneous details about her were disclosed. The reports focused only on the degree to which she was allegedly professionally involved in the errors at Dana Farber.

In sum, the Globe has met its burden of showing an absence of any factual dispute regarding whether the informa-

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[1] The headline in the original Knox story read, "Doctor's orders killed cancer patient."

tion disclosed about Ayash was newsworthy. Neither the general subject discussed in the reports nor the specific facts disclosed about Ayash were in any sense far afield from issues of public concern. The information was newsworthy as a matter of law, and no invasion of privacy action may lie against the Globe.

D.—

Ayash, in an additional effort to establish either a common law invasion of privacy action or a G.L. c. 214, § 1B claim, makes the intriguing argument that since a violation of G.L. c. 111, § 204, the medical peer review statute, occurred in this case, there is a factual question as to whether a substantial invasion of privacy occurred.

Paragraph (a) of G.L. c. 111, § 204, erects a general shield of confidentiality for "proceedings, reports and records of a medical peer review committee." This statute was passed in order to foster "rigorous and candid evaluation of professional performance by a provider's peers." *Swatch v. Treat*, 41 Mass. App. Ct. 559, 561 (1996); *Beth Israel Hosp. Assn. v. Board of Registration in Medicine*, 401 Mass. 172, 182-183 (1996). The statute provides that the work product of a medical peer review is "confidential, and shall not be subject to subpoena or discovery, or introduced into evidence."

The language of the statute, as well as case law construing it, demonstrates that its purpose was to make medical peer review material privileged and not discoverable in litigation. The statute precludes medical institutions from releasing internally generated materials and prohibits outside parties from obtaining such materials through legal mechanisms such as discovery.

Ayash contends that when medical peer review material is obtained and disseminated by a newspaper reporter, the reporter has violated G.L. c. 111, § 204. By extension, she argues, the dissemination of such statutorily protected ma-

terial constitutes an invasion of privacy and thus a violation of G.L. c. 214, § 1B.

Absent this sort of implied private right of action, Ayash argues, the statute is rendered toothless; for example, a hospital official who releases peer review material in violation of the statute faces absolutely no sanction, and any third party (e.g., a reporter) who disseminates this information likewise faces no adverse consequences.

The court disagrees that with the view that absent a private right of action, the statute is a near nullity. This particular statute -- like several others in the Commonwealth -- makes a certain category of information privileged and hence immune from discovery. The Legislature, had it intended either a specific sanction for a statutory violation or a private right of action to exist, could have so provided. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 (1977) (Virginia statute made it criminal offense to divulge information relating to a particular state commission).[5] Further, even absent either of these remedial avenues, the statute gives medical institutions the powerful ability to keep their peer review materials from potential litigants. This is appropriate, since the statute was passed "in response to a perceived medical malpractice crisis." *Beth Israel*, 401 Mass. at 173.

Further, Ayash's argument is foreclosed by *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1977). There, the Supreme Court found unconstitutional a statute making it a misdemeanor to publish information regarding proceedings before a state judicial review committee. Just

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[5] However, as discussed below, a statute that allowed either a criminal or civil remedy against a third party (*e.g.*, a newspaper reporter) who disclosed confidential, but lawfully obtained governmental information, would likely be unconstitutional. The Virginia statute in *Landmark* was voided by the Supreme Court on the grounds that it violated the media's First Amendment rights.

as the Landmark criminal statute was found to have an unconstitutionally chilling affect on the media's First Amendment rights, the civil remedy sought by Ayash would have the same effect. The following language from Florida Star, 491 U.S. at 534, where the Court declared void as unconstitutional an action against a newspaper for publishing lawfully obtained information, is also instructive:

> To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and *extend a damages remedy against the government or its officials* where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, *a less drastic means than punishing truthful publication* almost always exists for guarding against the dissemination of private facts.

Florida Star, 491 U.S. at 534 (emphasis added). *Cf. Time v. Hill*, 385 U.S. 374 (1967) (applying Constitutional standards for libel claims to false light invasion of privacy action).

The court declines to recognize a private right of action against a third party who obtains and disseminates material covered by the medical peer review statute.

E.

Although not raised in her brief, Ayash spent considerable time at oral argument advocating a "false light" invasion of privacy theory. See Restatement of Torts, 2d, § 652A(d). A false light invasion of privacy action is quite similar to a defamation action, in that it seeks to recover for the publication of erroneous or misleading information. However, Massachusetts has not recognized the false light

category of the invasion of privacy tort. *ELM Medical*, 403 Mass. at 787.

This court also declines to do so. Ayash's false light invasion of privacy claim is, the circumstances presented, essentially duplicative of her defamation claim. She seeks damages for allegedly false information printed in the Globe about her. *See Grimsley v. Guccione*, 703 F. Supp. 903 (M.D. Ala. 1988) (no false light action allowed where defamation action existed). There is no compelling need for the court to recognize the false light theory in this case.

ORDER

For the foregoing reasons, Defendants Globe Newspaper Company and Richard A. Knox's Motion for Summary Judgment as to Count VII of the Complaint is **ALLOWED.**

s/ Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: July 8, 1997

APPENDIX B – MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED FEBRUARY 23, 1998

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, AND
RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON (1) PLAINTIFF'S MOTION TO COMPEL THE BOSTON GLOBE AND RICHARD A. KNOX TO PROVIDE DISCOVERY REGARDING PURPORTED "CONFIDENTIAL SOURCES" AND (2) DEFENDANTS THE BOSTON GLOBE AND RICHARD A. KNOX'S MOTION FOR PROTECTIVE ORDER

Lois Ayash, M.D. ("Ayash") has moved to compel the Boston Globe and Richard A. Knox (collectively, "the Globe defendants") to provide discovery pursuant to her interrogatories, requests for the production of documents, and deposition questions. The Globe defendants oppose this motion and have moved for a protective order, asserting that the discovery which Ayash seeks is protected by the common law, Mass. R. Civ. P. 26(c), the First Amendment and Article 16 of the Massachusetts Declaration of Rights. After hearing arguments, and upon review of the parties' submissions, Ayash's motion is allowed and the Globe defendants' motion is denied.

Appendix B

BACKGROUND

In November of 1994, Betsy Lehman ("Lehman") and another patient at Dana Farber Cancer Institute ("the Institute") were accidentally given chemotherapy overdoses. On December 3, 1994, Lehman died as a result of this error. The Globe printed several articles, written by Knox, regarding Lehman's death. Most notably, in an article published on March 23, 1995, Knox wrote: "Five or six other doctors and nurses countersigned the mistaken order, including Dr. Lois J. Ayash, leader of the team."

Ayash has brought claims against the Globe defendants for defamation and invasion of privacy as a result of these stories.[1] Ayash alleged that these articles contained false and damaging statements about her and her role in Lehman's overdose and death. Knox admitted in his deposition that he knew within four days of the initial publication that Ayash did not countersign the overdose orders. However, the Globe did not publish a correction until June 4, 1995.

In the course of discovery, Ayash has sought the production of documents, answers to interrogatories, and deposition testimony from the Globe defendants with respect to the source or sources of the information underlying the articles. The Globe defendants have categorically refused to provide any documents, answers, or testimony as to the source of their information, asserting a confidential source privilege.

Ayash has now moved to compel this disclosure, asserting that no recognized privilege exists which protects the information sought. In response, the Globe defendants have moved for a protective order, contending that Ayash's need for this information is outweighed by the potential harm to the public interest in the free flow of information.

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[1] The court (Lauriat, J.) granted summary judgment in favor of the Globe defendants on the invasion of privacy claim on July 9, 1997.

Appendix B

DISCUSSION

I. Ayash's Motion to Compel

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Mass. R. Civ. P. 26(b). This discovery includes information which, even if inadmissible at trial, appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* News reporters do not have a constitutionally based privilege which protects their sources of information. *In the Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 598 (1991) (citations omitted). Nor is there any statutory privilege or rule of court providing such a privilege. *Id.* Nonetheless, defendants urge the court to prevent discovery based upon a "balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information*, 395 Mass. 164, 172 (1985); see also *John Doe*, 410 Mass. at 600.

Before the court will undertake such a balancing test, the Globe defendants, as the parties seeking to prevent disclosure, have the burden of showing that the asserted damage to the free flow of information is more than speculative or theoretical. *John Doe*, 410 Mass. at 600 n.l; *Sinnott v. Boston Retirement Board*, 402 Mass. 581, 586 (1988); *Petition for the Promulgation of Rules*, 395 Mass. at 172. The Globe defendants argue that compelling disclosure of Knox's source or sources would infringe upon the values protected by the First Amendment. *Sinnott*, 402 Mass. at 586. However, in this case the court concludes that allowing Ayash's discovery requests would not have the chilling effect on the free flow of information that the Globe defendants fear.

This is not a case where the informant continues to provide information to a reporter or the investigation is ongoing. Cf. *Id.* at 587 & n.5. Rather, the information was given

to Knox over two and a half years ago with respect to an isolated incident, to wit, the overdosing of two chemotherapy patients. Also, the information sought is not cumulative or otherwise available. Cf. *John Doe*, 410 Mass. at 600 (on balance, production of reporters' sources unnecessary in grand jury proceeding where district attorneys knew of all sources of the information). The Globe defendants have thus failed to meet their burden of showing that the potential harm to the free flow of information is neither speculative nor theoretical. Accordingly, the court is not required to perform the balancing test asserted by the Globe defendants. *Sinnott*, 402 Mass. at 586.

Even if the Globe defendants had met their burden, the court would find that Ayash's need for this information is tangible and substantial and thus outweighs the risk of harm to the free flow of information to the press. Ayash has, despite the Globe defendants' contrary view, exhausted all reasonable alternative sources for the information. Id. at 587. Also, the Globe defendants' contention that Ayash should continue to seek the information from alternate sources places an undue burden on Ayash. *Id.*; *Petition for the Promulgation of Rules*, 395 Mass. at 171.

Finally, in libel cases especially, disclosure is required because discovery of the sources of the allegedly libelous statement is central to plaintiff's claim. *Dow Jones & Co., Inc. v. Superior Court*, 364 Mass. 317, 319 (1973). Additionally, the information is sought from a party to the action and the information which the Globe defendants seek to keep confidential "relates to the factual issue which is central to the plaintiff's case." *Id.* at 322. On balance, then, the court concludes that Ayash's right to disclosure of the requested information from the Globe defendants in this case outweighs any potential harm to the free flow of information. Ayash's motion is therefore allowed.

Appendix B

II. The Globe and Knox's Motion for a Protective Order

In light of the court's ruling that Ayash is entitled to discover the source or sources of the Globe defendants' information, and that such discovery is not protected by any privilege, the Globe defendants' motion for a protective order must be denied.

ORDER

For the foregoing reasons, (1) Plaintiff's Motion to Compel the Boston Globe and Richard A. Knox to Provide Discovery Regarding Purported "Confidential Sources" is **ALLOWED** and (2) Defendants the Boston Globe and Richard A. Knox's Motion for Protective Order is **DENIED.**

s/Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: February 23, 1998

APPENDIX C – ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED APRIL 13, 1998

APPEALS COURT
NO. 98-J-211

LOIS AYASH

V.

DANA-FARBER CANCER INSTITUTE & OTHERS

ORDER

The petition of the defendants Globe Newspaper Company and Richard Knox, pursuant to G. L. c. 231, § 118, par. 1, seeking reversal of, or leave to take an interlocutory appeal from, the February 23, 1998, orders of a judge of the Suffolk Superior Court (a) allowing the plaintiff Lois Ayash's motion to compel the petitioners to provide discovery regarding purported "confidential sources" and (b) denying the petitioners' motion for a protective order, is hereby denied.

It is not the function of the single justice to second-guess or displace the exercise of the very extensive discretion possessed by trial judges in all matters of pretrial management, the exemplars of which are the scope and conduct of discovery. The only significant exception to that fundamental policy occurs when a petitioner asserting a recognized privilege convincingly demonstrates to the single justice that the judge below committed an abuse of discretion of such a clear and egregious sort -- essentially amounting to an irrational ruling unsupportable on any reasonable basis -- that the privilege has been or will be irreparably impaired to the substantial detriment both of the petitioner and the public interest.

Substantially persuaded by the reasoning contained in the judge's memorandum of decision and the arguments set forth at pages 4-15 of the plaintiff's opposition to the petition, I conclude that the petitioners' showing here falls far short of that stringent standard. Particularly in light of the

petitioners' repeated assertions that there are no confidential sources to disclose with respect to the statements alleged by the plaintiff to have been defamatory, their showing fails to establish that the claimed damage to the free flow of information is anything more than speculative and theoretical.

To the extent the form of protective order proposed by the petitioners' motion below (which does not appear in the record before the single justice) simply prohibited all of the discovery sought to be compelled by the plaintiff, for denial of that motion occasioned no error or abuse of discretion, for the reasons discussed above. The instant order of the single justice is, however, without prejudice to the petitioners' making a more focused motion in the Superior Court for a more narrowly tailored protective order reasonably limiting, on specified terms and conditions, the use, disclosure, and dissemination of any privileged or confidential information produced in compliance with the February 23, 1998, order.

Finally, the petitioners have presented insufficient reasons for the single justice to authorize the greatly disfavored and infrequently allowed relief of leave to prosecute an immediate interlocutory appeal, particularly failing to demonstrate that this case qualifies as one of the extraordinary situations warranting a rare exception to that long-standing policy of this court. Indeed, as the plaintiff's opposition observes (at pages 6-7), the petitioners have it within their own power to obtain the right of immediate appeal.

So ordered.
By the Court (Laurence, J.),

Assistant Clerk

Entered: April 13, 1998.

APPENDIX D – ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED AUGUST 13, 1998

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0565E

LOIS AYASH, M.D.,

V.

DANA-FARBER CANCER INSTITUTE,
DAVID M. LIVINGSTON,
THE BOSTON GLOBE, AND
RICHARD A. KNOX

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS PURSUANT TO RULE 37 AGAINST THE BOSTON GLOBE AND RICHARD KNOX

> "No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."
>
> -Theodore Roosevelt

The plaintiff, Lois Ayash, has moved, pursuant to Mass. R Civ. P. 37(b), for the imposition of sanctions against the Boston Globe newspaper and its reporter, Richard Knox ("Knox") (collectively, "the Globe defendants"), for their failure to comply with this Court's discovery order dated February 23, 1998. On that date, the Court allowed the plaintiff's motion to compel discovery and ordered the Globe defendants to provide discovery regarding the purported "confidential sources" relied upon by Knox in a series of articles which appeared in March of 1995; the articles, authored by Knox, concerned the death of Boston Globe reporter Betsy Lehman from an accidental chemotherapy overdose that she received while a patient at the Dana Farber Cancer Institute. The Court also denied the Globe defendants' mo-

tion for a protective order. A single justice of the Appeals Court, relying on the reasoning in the Superior Court decision, affirmed both orders. He also affirmed without prejudice the denial of the Globe defendants' motion for a protective order so as to allow the Globe defendants an opportunity to submit a more narrowly framed protective order to the Superior Court.

Subsequent to the Appeals Court decision, the plaintiff resumed her deposition of Mr. Knox, and pursuant to the order to compel discovery, questioned Mr. Knox regarding his "confidential sources." Mr. Knox declined to reveal the purported "confidential sources" or any information which might have led to discovery of those sources. The Globe defendants have steadfastly refused to provide any discovery regarding the purported "confidential sources" under any circumstances.[1] The Court finds that their ongoing refusal to comply with the February 23, 1998 discovery order constitutes a contempt of court and renders the Globe defendants subject to sanctions under Mass. R Civ. P. 37(b).

In fashioning a sanction for civil contempt, a court has the power to impose a prospective daily fine in order to coerce a defendant into complying with the court's order. See Labor Relations Comm'n v. Fall River Educators' Assn., 382 Mass. 465, 476 (1981). The purpose of a prospective daily fine in this case would be to coerce Mr. Knox and the Boston Globe into providing discovery regarding the purported "confidential sources" pursuant to the terms of the February 23, 1998 order. See id. To that end, this Court issues the following order:

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[1] For example, although Ayash has agreed to accept a limited protective order and this Court has indicated its willingness to grant such an order, the Globe defendants have refused to consider this proposal.

Appendix D

ORDER

This Court hereby ORDERS that, commencing, Monday, August 24, 1998, defendant Richard Knox is to pay to the Suffolk County Superior Court Civil Clerk the sum of $100.00 per day unless and until he complies with the Court's discovery order of February 23, 1998. Commencing August 31, 1998, the required payment will increase to $200.00 per day. Commencing September 7, 1998, the required payment will increase to $300.00 per day. Commencing each Monday thereafter, the required payment will increase in the same manner at $100.00 per day for each successive week that Mr. Knox fails to comply with the Court's order of February 23, 1998.

This Court further ORDERS that commencing Monday, August 24, 1998, defendant the Boston Globe newspaper is to pay to the Suffolk County Superior Court Civil Clerk the sum of $1000.00 per day unless and until it complies with the Court's discovery order of February 23, 1998. Commencing August 31, 1998, the required payment will increase to $2000.00 per day. Commencing September 7, 1998, the required payment will increase to $3000.00 per day. Commencing each Monday thereafter, the required payment will increase in the same manner at $1000.00 per day for each successive week that the Boston Globe newspaper fails to comply with the Court's order of February 23, 1998.

s/Peter M. Lauriat
Peter M. Lauriat
Justice of the Superior Court

Dated: August 13, 1998

MOTION FILED
JUL 7 - 2005

(3)

No. 04-1634

IN THE
Supreme Court of the United States

GLOBE NEWSPAPER COMPANY, INC. and RICHARD A. KNOX,
Petitioners,

v.

LOIS J. AYASH, M.D.,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*; AND BRIEF *AMICI CURIAE* OF ABC, INC.; ADVANCE PUBLICATIONS, INC.; THE ASSOCIATED PRESS; CBS BROADCASTING INC.; GANNETT COMPANY, INC.; THE HEARST CORPORATION; MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION; METROCORP; NEW ENGLAND NEWSPAPER ASSOCIATION; NEW ENGLAND PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; NYP HOLDINGS, INC.; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; AND TIME INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF ABC, INC.; ADVANCE PUBLICATIONS, INC.; THE ASSOCIATED PRESS; CBS BROADCASTING INC.; GANNETT COMPANY, INC.; THE HEARST CORPORATION; MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION; METROCORP; NEW ENGLAND NEWSPAPER ASSOCIATION; NEW ENGLAND PRESS ASSOCIATION; NEWSPAPER ASSOCIATION OF AMERICA; NYP HOLDINGS, INC.; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; SOCIETY OF PROFESSIONAL JOURNALISTS; AND TIME INC. IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, ABC, Inc.; Advance Publications, Inc.; The Associated Press; CBS Broadcasting Inc.; Gannett Company, Inc..; The Hearst Corporation; Massachusetts Newspaper Publishers Association; Metrocorp; New England Newspaper Association; New England Press Association; Newspaper Association of America; NYP Holdings, Inc.; The Reporters Committee for Freedom of the Press; Society of Professional Journalists; and Time Inc.. respectfully requests leave to file the attached brief *amici curiae* in support of Petitioners, Globe Newspaper Company, Inc. and Richard A. Knox. Petitioners have consented to the filing of this brief. Respondent refused to give her consent.

Amici, which are individually described in Appendix A, include leading news organizations in Massachusetts, greater New England, and throughout the United States, as well as related professional and trade associations. They share an interest in promoting excellence in journalism and in defending the freedom of the press. Of particular interest here, *Amici* are committed to preventing undue legal burdens from being imposed upon investigative reporters' ability to use confidential sources, to safeguard the identities of such

sources, and to report on matters of serious public interest confident that liability cannot be imposed without the constitutional requirements of falsity and fault having been met. Media coalitions like the one here have participated in this Court on numerous occasions.

In this case, the Massachusetts Supreme Judicial Court affirmed a default judgment, leading to a $2.1 million jury verdict, against a newspaper and its reporter as punishment for their declining to reveal the identities of confidential sources. The principal basis for this verdict, a libel claim Respondent had asserted against them, was not even implicated in the discovery dispute. And the remaining basis for the verdict, other tort claims against the reporter, were never shown to have any potential merit whatsoever.

Amici believe the Massachusetts Supreme Judicial Court's decision, which sweeps under the rug the substantial federal constitutional authority at odds with the result it reaches, presents a serious threat to the freedom of the press. *Amici* and their members often are involved in disputes concerning the identities of confidential news sources, and they often have been forced to litigate these issues. *Amici* often are faced with the untenable choice *The Boston Globe* and its reporter faced here. *Amici* therefore can bring substantial experience to bear on the issues presented here – not simply in terms of legal expertise but also in terms of describing the practical impact of this decision on newsgathering and the free flow of information. *Amici* respectfully submit that its views will aid this Court in considering the Petition for Certiorari.

Respectfully submitted,

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INTRODUCTION AND INTEREST OF *AMICI*

Amici, which are individually described in Appendix A, include leading news organizations in Massachusetts, greater New England, and throughout the United States, as well as related professional and trade associations.[1] They share an interest in promoting excellence in journalism and in defending the freedom of the press to report on matters of public concern. Of particular interest here, *Amici* are committed to preventing undue legal burdens from being imposed upon investigative reporters' ability not only to use confidential sources and to safeguard the identities of such sources, but to report on matters of public concern confident that such reporting will be accorded full constitutional protection.

The Massachusetts Supreme Judicial Court's decision in this case places these longstanding journalistic values at great risk. It imposes a punishment for failure to comply with an order to disclose a confidential source – a default judgment and a $2.1 million verdict – that is far more severe than necessary to address the consequences of the nondisclosure. Even worse, the basis for part of the default judgment and the vast bulk of damages is a libel claim that was wholly unrelated to the discovery dispute. Serious constitutional problems arise not only from the overzealous nature of the default judgment itself but also from the fact that it was imposed following a *successful* appeal of the court's prior disclosure order. The judgment also imposes tort liability on the media, in violation of well established First Amendment precedent, in the absence of any finding that the publications were false or published with fault.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

This Court should grant certiorari to make it clear that the Due Process Clause and the First Amendment prohibit a court from entering a default libel judgment against the press for declining to comply with a disclosure order, much less from leaving it to a jury to assign a whopping monetary "sanction" for such a discovery dispute. The decision below inaugurating open season on *Amici* and other media, subjecting them to multi-million dollar verdicts based on libel claims, no matter how without merit, whenever their reporting uses confidential sources whose identities they do not want to reveal.

REASONS FOR GRANTING THE WRIT

Respondent in this case sued Dana-Farber Cancer Institute and one of its employees for various torts; Petitioners (the Globe and its reporter, Richard Knox) for libel; and Knox for intentional infliction of emotional distress and interference with business opportunity. Respondent conceded she did not need to know the identities of the Globe's confidential sources "to pursue her libel claims." Pet. App. 46a; *see also* Pet. App. 78a n.1, 87a. Respondent, however, sought the identities of the Globe's sources "in order to pursue her claims against Knox for intentional infliction of emotional distress and against Dana-Farber for invasion of privacy and breach of the implied covenant of good faith and fair dealing." Pet. App. 46a. When the Globe declined to abide by the trial court's disclosure order, the trial court entered a default judgment against Petitioners on all claims against them. This judgment warrants review with respect to the libel claim, as well as with respect to the claims against Knox.

I. This Court Should Grant Certiorari To Reaffirm That A Sanction For Failure To Divulge Information May Not Extend Beyond The Claim For Which Discovery Was Sought.

The default judgment on Respondent's libel claims – claims with respect to which Respondent conceded the identities of the Globe's sources were irrelevant, Pet. App. 46a, 78a n.1, 87a – generated a jury verdict for almost $2 million in damages. Pet. for Cert. 8. Petitioners amply have explained to the Court how the Massachusetts Supreme Judicial Court's ruling upholding this judgment squarely conflicts with the settled due process rule requiring a discovery sanction to be "specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 706-07 (1982). The ruling, as Petitioners also explain, is doubly unconstitutional because it allows a public-figure plaintiff to recover damages for libel without proving any publication was false or that the press acted with actual malice. Pet. for Cert. 10-13.

Amici will not repeat Petitioners' arguments. But *Amici* do wish to emphasize that the need for certiorari is particularly pressing here because the Massachusetts Supreme Judicial Court did not just reject Petitioners' constitutional arguments; despite several pages of briefing from Petitioners and *amici*, it ignored them altogether. *See* Br. of Appellees (and Cross-Appellants) Globe Newspaper Co., Inc. and Richard A. Knox, *Ayash v. Dana-Farber Cancer Inst.*, No. SJC-09236, at 16-28; Br. of *Amici Curiae* ABC, Inc. et al., No. SJC-09236, at 27-29. Consequently, if left undisturbed, the decision below will signal to other courts not only that draconian contempt sanctions against the press are permissible but that they do not even raise federal issues. While this Court's hands might be tied if the appropriate federal objections had not been raised below, that

is hardly the case here. Petitioners raised constitutional objections to the default judgment at each stage of the proceedings. Accordingly, this Court should send a strong signal to state courts that they have a duty to address and respect such constitutional objections.

This Court's intervention also is needed to squelch the potential for abuse that the Massachusetts Supreme Judicial Court's opinion creates. Plaintiffs often pursue lawsuits based on information they learn in the press. *See, e.g., Shoen v. Shoen,* 5 F.3d 1289 (9th Cir. 1993); *Wright v. The Fred Hutchinson Cancer Research Center,* 206 F.R.D. 679 (W.D. Wash. 2002). Plaintiffs in such cases may seek discovery from the press according to third-party discovery rules. But prior to the decision here, the press did not risk financial liability for its own reporting if it asserted the journalistic privilege or any other defense to third-party discovery. The Massachusetts Supreme Judicial Court's ruling that a plaintiff can obtain a default libel judgment against the press, irrespective of any showing of the libel claim's merit, for the press's failure to divulge information related to *other* claims provides an incentive for plaintiffs to file meritless libel claims against the press in every case in which they might wish to seek discovery from it. The press will face threats of multimillion dollar liability for nondisclosure where before it faced only third-party discovery sanctions (which, in the context of civil suits, have never even approached the million dollar range). This Court should not countenance such a dramatic shift in litigation incentives.